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Supreme Court of the United States

OCTOBER TERM 1941

No. 15

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,
Appellant,

v.

DOROTHEA T. FRANK,
Appellee.

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

ON REHEARING

BRIEF FOR APPELLEE

TO BE SUBSTITUTED FOR BRIEFS PREVIOUSLY FILED BY APPELLEE

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SUBJECT INDEX

TABLE OF CASES CITED

STATUTES CITED

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Opinion Below

The opinion of the Municipal Court is reported:

Frank v. *New York, Chicago & St. Louis R.R. Co.*, 175 Misc. 902, 24 N. Y. S. (2d) 846.

Summary of Argument

Section 143, New York Railroad Law, as applied in this case, does not conflict with § 20a, Interstate Commerce Act. § 20a does not apply.

The consolidation by which appellant was formed was effected under the laws of five States, among them New York, at a time when the State laws governing consolidation had not been superseded as to interstate carriers by Federal enactment.

Under § 142 of the New York Railroad Law (Consolidated Laws of New York, Chap. 49), the new corporation created by the consolidation acquired all of the property of its constituent companies. § 143 provides that all the debts and liabilities of the constituent companies shall thenceforth attach to the new corporation and be enforced against it and its property to the same extent as if incurred or contracted by it.

The then existing liability of the Lake Erie & Western Railroad Company upon its guaranty of the Northern Ohio interest coupons attached to appellee, the consolidated corporation, as an incident to the consolidation, by force of the statute pursuant to which the consolidation was effected. It was not a new obligation assumed by the new corporation, but an existing obligation which attached to it. It did not come within the purview of § 20a of the Interstate Commerce Act; it is not an assumption for which application to and authorization by the Interstate Commerce Commission were required.

Section 5 of the Interstate Commerce Act, as amended in 1933, gives the Interstate Commerce Commission plenary and complete powers over plans of consolidation, which would include jurisdiction of the subject-matter of the attachment of security obligations to a consolidated corporation. Granted that Congress has since 1933 intended not to exclude such subject-matter from the Commission's jurisdiction, it is not necessary to hold that § 20a is aimed at subsisting debts of the constituents of a consolidated corporation in order to find the statutory sanction for such jurisdiction.

It is not the purpose of that section to permit those debts and liabilities to be extinguished or the rights of the holders thereof impaired. Yet such result would follow, if § 20a were held to extend to such cases, from the mere failure or deliberate refusal of the new corporation to apply to the Interstate Commerce Commission for leave to assume liability. Such result might constitute a deprivation without due process of law of the rights and property of the creditors of the constituent corporations.

When application was made to the Commission by this appellant consolidated corporation for authority to operate the lines of its constituents and to issue its own capital stock in exchange for the capital stock of its constituents, pursuant to the Articles of Consolidation, the Commission was cognizant of the provisions of the applicable State statutes, by the terms of which the liabilities of the constituent corporations attached to the new corporation, and, in effect, approved those terms when it authorized the proposed issue and found that such issue was "compatible with the public interest * * * necessary and appropriate for and consistent with the performance by the carrier of service to the public as a common carrier, and will not impair its ability to perform that service".

The Interstate Commerce Commission has not construed § 20a as including, under the term "assume", the attachment to a consolidated corporation, created under State laws alone, of the subsisting obligations of its constituents. The administrative interpretation seems to be the other way.

If authorization to assume liability was necessary, it was incumbent on appellant to make application therefor and it should not be heard to plead its own omission to do so as a defense.

The application of § 20a to consolidations effected under the amendment of 1933 is not in question and not to be determined on this appeal.

ARGUMENT

POINT I

§ 143, New York Railroad Law, as applied in this case, does not conflict with § 20a of the Interstate Commerce Act.

The consolidation by which appellant was created was effected under State laws (R. 7, 13, 23), at a time when § 407 of the Transportation Act of 1920 (41 St. L. 480, Chap. 91; U. S. C., Title 49, § 5), amending § 5 of the Interstate Commerce Act, had not yet become applicable to such cases.

> *Snyder* v. *N. Y., Chicago & St. Louis R. Co.*, 278 U. S. 578, 49 S. Ct. 176, affirming 118 Ohio St. 72.

Since that time, by § 5, subdivision (4) of the Interstate Commerce Act, as amended (Act of June 16, 1933, Chap. 91, § 202), the Congress has entered the field so far as relates to the consolidation of interstate carriers, thus superseding, to the extent of such legislation, the State statutes.

This case, however, deals with a consolidation validly effected solely under State statutes.

§ 142 of the New York Railroad Law (Consolidated Laws of New York, Chap. 49) provided:

> "Upon the consummation of such act of consolidation all the rights, privileges, exemptions and franchises of each of the corporations, parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of them, as well as all stock subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, demands, property, rights of way and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to such agreement and act * * *."

It is conceded that appellant did acquire the properties of its constituent companies (R. 7, 14).

The Lake Erie & Western Railroad Company, one of the constituents of the consolidated corporation (R. 7, 13), had guaranteed payment of interest coupons of the Northern Ohio bonds, in October, 1895, simultaneously with the issuance of the bonds (R. 12, 13). This was before the enactment of § 20a of the Interstate Commerce Act (U. S. C. Title 49; 41 Stat. 494; Act Feb. 28, 1920, Chap. 91, § 439), and the validity of that guaranty is not here in question.

New York Railroad Law (Consolidated Laws of New York, Chap. 49), § 143, provides:

> "The rights of all creditors of, and all liens upon the property of, either of such corporations, parties to such agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it * * *."

No new obligation was here "assumed" by appellant. The liability had been created by The Lake Erie & Western Railroad Company, and as an existing obligation of one of its constituents "attached" to the consolidated corporation. Appellant's liability is not predicated upon any "assumption" within the purview of § 20a, but upon the fact that the debts of the constituent corporations "attached" to the consolidated corporation by the very terms of § 143. The attachment of that liability was imposed upon the new corporation by the State statute as a condition of the consolidation. § 20a does not embrace such a situation; it does not pertain to obligations attaching to a corporation by consolidation under State laws, with which the Commission had no power to interfere.

Friedman v. *N. Y., C. & St. L. R. R. Co.*, N. Y. L. J., April 27, 1940, p. 1740 (per Rosenman, J.).

It was not the purpose of § 20a to permit the debts and liabilities of the constituent corporations to be defeated or the rights of their creditors to be impaired. Yet such result would follow, if § 20a were held to extend to such cases as this, from the mere failure or deliberate refusal of the new corporation to apply to the Interstate Commerce Commission for leave to assume liability. That could easily constitute a deprivation without due process of law of the rights and property of the creditors of the constituent corporations.

While the bondholders may have a remedy in equity against the mortgaged properties (*R. R. Co.* v. *Howard*, 7 Wall. 392), they should not be limited and restricted to that remedy—they ought not to be compelled to forego the guaranties or the liability thereon, which, through consolidation, devolved upon appellant.

The Lake Erie & Western Railroad Company, whose property and assets have vested in appellant, is left by the consolidation in this position: "There is then no power left to control in its behalf any of its funds, or to pay off any of its indebtedness" (*Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 528).

If, in these circumstances, the bondholders may not enforce the guaranty of The Lake Erie & Western Railroad Company by recourse to the liability which, as a condition of the consolidation is imposed upon the new corporation by § 143, to be "enforced against it and its property to the same extent as if incurred or contracted by it"; if the bondholders are to be limited to their recourse against the mortgaged properties (for, surely, they could not unscramble the commingled assets of the consolidated corporation), then their claims might well be impaired by the transfer of the property, and if § 20a were to be construed as requiring the authorization of the Interstate Commerce Commission in such a situation, then the creditors of the constituent corporations might be deprived of their rights and property without due process of law, and this, of course, may not be done even in the regulation of commerce.

United States v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 327, 51 S. Ct. 159.

We are not unmindful of the holding in *Irvine* v. *New York Edison Co.*, 207 N. Y. 425. But there the constitutional question was not considered.

There is no need to consider whether the attachment of liability is or is not the result of voluntary action. The question is whether under § 20a the term "assumption" applies to a liability which, by virtue of applicable State statute, attaches upon consolidation. We submit it does not.

Cases are cited which speak of "assumption" by a consolidated corporation of the liabilities of the old companies. But in those cases the expression was employed loosely and not in the sense which appellant seeks to impress upon it.

> "It cannot be reasonably expected that every word, phrase or sentence contained in a judicial opinion will be so perfect and complete in comprehension and limitation that it may not be improperly employed by wresting it from its surroundings, disregarding its context and the change of facts to which it is sought to be applied, as nothing short of an infinite mind could possibly accomplish such a result."
>
> *Crane* v. *Bennett*, 177 N. Y. 106, 112.

No provision of § 20a applies to the facts of this case or deals with obligations which attached on consolidation under State laws alone.

The fact that the Commission, in *Assumption of Obligations by L. S. & I. R. R.*, 86 I. C. C. 640, entertained and granted the application is no indication that the Commission construed § 20a as requiring the making of such application. Rather, from the language it used, the inference is that the Commission deemed the State statutes fully effective in attaching liability irrespective of the application.

Such also is the inference to be drawn from other decisions by the Commission, not involving the attachment to the consolidated corporation of the existing liabilities of its constituents:

> "The applicant is the successor, by consolidation, of the Toledo, St. Louis & Western Railroad Co. and other companies and by virtue of such consolidation has acquired all property, rights and powers and has assumed all obligations of the Toledo, St. Louis & Western Railroad Co."
>
> *Pledge of Toledo, St. Louis & Western Bonds by New York, Chicago & St. Louis Railroad*, 86 I. C. C. 465 (1924).

It is to be noted that the Toledo, St. Louis & Western is one of the parties to the consolidation here under consideration (R. 7, 13-14, 24).

> "The first mortgage bonds of the Northern bear the guaranty of the Lake Erie & Western, predecessor lessee, and unpaid interest coupons have been purchased on behalf of the New York, Chicago & St. Louis. From the consolidation of the Lake Erie & Western with the New York, Chicago & St. Louis, resulting liability of the latter on the Lake Erie's guaranty of the Northern's bonds thus is apparently admitted."
>
> *Akron, C. & Y. Ry. Co. and Northern O. Ry. Co. Reorganization*, 228 I. C. C. 645.

This has reference to the same guaranty upon which the present suit is predicated.

> "It appears that the consolidation was completed on April 11, 1923, and that the new company is now vested with the property, rights and franchises of the Nickel Plate and other constituent companies, subject to all their debts, obligations and liabilities."
>
> *New York, Chicago & St. Louis R. R. Bonds*, 82 I. C. C. 365.

Missouri-Kansas-Texas Railroad Co. v. *Mars*, 278 U. S. 258, 49 S. Ct. 103, did not involve a consolidation. There the appellant had acquired railroad properties from a group who had purchased them from a receiver of the corporation which had originally owned them. A Texas statute authorized such a receivership sale but provided that the property so sold should be sold subject to certain tort claims. The property was bought from the receiver subject to these tort claims and the new company took the properties from the purchaser subject to these claims. Appellant there sought to invoke § 20a of the Interstate Commerce Act to excuse a refusal to honor such a tort claim. This Court held § 20a to be inapplicable.

Railroad Commission v. *Southern Pacific Company*, 264 U. S. 331, 44 S. Ct. 376, bears no analogy to the case at bar. There, the State Commission sought to impose upon an interstate carrier a new "undertaking", i. e., the building of a union station.

New York, C. & St. L. R. Co., Assumption of Obligations, 217 I. C. C. 598, and *New York, C. & St. L. R. Co., Bonds and Assumption*, 221 I. C. C. 772, both relate to assumption of liability under agreements extending maturity dates. Since they related to new evidences of debt, they were, of course, governed by § 20a. But it must be manifest from both of those instances that the construction placed upon § 20a both by the Commission and by the appellant was such that in respect of the obligations which attached upon consolidation, no application or authority to assume liability was required. 217 I. C. C. 598 related to bonds, which the Lake Erie & Western had issued prior to the consolidation and were to mature January 1, 1937. 221 I. C. C. 772 related to bonds which the former New York, Chicago & St. Louis had issued prior to the consolidation and were to mature October 1, 1937. It is clear that from the time of the consolidation in April, 1923 (R. 7, 13, 23), until November, 1936, and August, 1937, respectively, when these applications to authorize the extensions were made, this appellant consolidated corporation had paid the interest

upon the original bond issues, without application to the Commission for or grant by the Commission of aathority to do so—obviously because such application and authority in that connection were deemed, and rightly so, to be unnecessary.

New York Central Securities Corp. v. *United States*, 54 F. (2d) 122, aff'd 287 U. S. 12, 53 S. Ct. 45; *Texas* v. *United States*, 292 U. S. 522; 54 S. Ct. 819; *People* v. *New York Central R. Co.*, 233 N. Y. 679, and *Whitman* v. *Northern Central Ry. Co.*, 146 Md. 580, 127 Atl. 112, are not germane, since they do not relate to liabilities attaching by consolidation.

This appellant consolidated corporation did apply to the Interstate Commerce Commission for authority to operate the lines of its constituents and to issue its own capital stock in exchange for the capital stock of its constituents, pursuant to the Articles of Consolidation.

> *Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company*, 79 I. C. C. 581.

Authority to acquire the consolidated lines was not required by § 5. Paragraph (2) of that section applied only to a plan "not involving consolidation"; and the provisions of paragraph (6) of that section relative to consolidation had not yet become applicable. It was possible, however, that a certificate of public convenience might be considered requisite under § 1(18). So the application therefor was appropriate.

The issuance by appellant of its own capital stock came within the letter of § 20a, and so application for authority on that behalf was likewise appropriate, though there is doubt as to whether it was applicable.

But the debts of the constituent companies attached to the consolidated corporation, as a condition of the consolidation, by virtue of applicable State statutes which had not as yet been superseded by Federal enactment. There-

fore, to charge the consolidated company with liability thereon, the authority of the Interstate Commerce Commission to assume such liability was not requisite.

Nevertheless, in connection with appellant's application for authority to operate the lines of its constituents and to issue its own stock, the Interstate Commerce Commission did have and exercised the power of approval with regard to the obligations and liabilities which attached by the consolidation. When that application was made, the Commission was fully cognizant of the provisions of the applicable State statutes by the terms of which the liability of its constituents attached to the consolidated corporation. This is clearly shown by the opinion which the Commission rendered:

> "Applicable state laws afford means to effect the consolidation. Such laws are in force. They are, in fact, the laws to which resort must be had to effectuate consolidations which the interstate commerce act is designed to facilitate. We cannot conclude that they have been nullified or superseded. As valid existing laws we have no power to suspend them."
>
> *Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company*, 79 I. C. C. 581, 585 (June 18, 1923).

It is fair to assume, therefore, that when the Commission granted to appellant the authority to operate the lines and issue its stock in exchange for the stock of its constituents, it necessarily approved the conditions under which the consolidation was effected, including the attachment to the new company of the liabilities of its constituents; for it found, and under § 20a (2) it could make the order only if it did find, that such new issue was "compatible with the public interest * * * necessary and appropriate for and consistent with the performance by the carrier of service to the public as a common carrier, and will not impair its ability to perform that service".

POINT II

Appellant may not assert a defense, based upon its own omission to apply for authority to assume liability.

In 1923 appellant obtained an authorization from the Interstate Commerce Commission to operate the lines of the constituent companies and to issue the stock of the new company in exchange for the stock of the constituent companies. It clearly appears from the Commission's report that the Commission conceived its function as supplementing and facilitating consolidations which were still to be effected under State law. Applicable State laws provided that the obligations of the constituent companies should attach to the consolidated company. Appellant, now disputing that obligations so attach, in effect, holds that the Commission's own conception of its jurisdiction was erroneous. Appellant would retain the benefits of an authorization obtained under what it holds to be an erroneous conception of the Commission's function without first attempting to set the matter to rights before the Commission itself.

Under § 20a, the proceedings before the Commission are set in motion and the Commission acts "upon application by the carrier". Unless the carrier applies, the Commission can make no order authorizing the assumption of obligation or liability. If then such authorization was necessary, it was incumbent upon the appellant to make such application and it should not be heard to plead its own omission to do so as a defense.

Maroney v. *Wheeling & L. E. Ry. Co.*, 33 F. (2d) 916, 917.

Cheatham v. *Wheeling & L. E. Ry. Co.*, 37 F. (2d) 593, 596.

Murphy v. *North American Light & Power Co.*, 106 F. (2d) 74, 81-82.

Had appellant made such application, and had the Commission thereupon refused to authorize such assumption, then appellant would be justified in asserting such refusal as a defense; but it cannot have been intended that appellant might, by omitting to make such application, claim immunity from discharging the debts and liabilities of its constituent corporations; nor did it claim such immunity when, without specific authorization, it made interest payments on the Northern Ohio coupons and on the mortgage bonds of its constituents.

Appellant's position in seeking shelter behind § 20a is unconscionable. It is clear that when it granted appellant's application (79 I. C. C. 581) to authorize the issuance of capital stock and the acquisition and operation of the lines of its constituents, the Interstate Commerce Commission assumed and acted on the assumption that by applicable State laws the debts and liabilities of the constituents attached to the consolidated corporation, without application or authorization under § 20a. This is borne out by the Commission's statement in two later cases:

> *Pledge of Toledo, St. Louis & Western Bonds by New York, Chicago & St. Louis Railroad*, 86 I. C. C. 465.
>
> *Akron C. & Y. Ry. Co. and Northern O. Ry. Co. Reorganization*, 228 I. C. C. 645.

Moreover, the Commission, in authorizing the proposed stock issue of the new company, must have taken into account the security obligations ahead of that stock, which obligations included the guaranty here in suit.

Assuming that the Commission could make a valid order, authorizing a consolidation, without the attachment of the security obligations of the constituent companies, it is most unlikely that the Commission would ever have granted such an application. Rather, they would have insisted that application be made that these obligations should attach to the new corporation as a condition of authorizing the consolidation of the properties.

When appellant came before the Commission with the application which was granted in 79 I. C. C. 581, it must have considered the applicability and effect of the State statutes, including the New York Railroad Law, § 143, which provided for the attachment of the liabilities of the constituent corporations to the new corporation. With respect thereto, it must have taken one of three positions: Either that the State statute attaching liability did govern, without application or authorization under § 20a; or that it did not; or that the question was in doubt.

If it took the first of these positions, then it shared the view of the Interstate Commerce Commission and procured its authorization on that basis. If now it should be held by this Court that § 143 did not apply and § 20a does, then it is clear that the authorization for which appellant applied and which the Commission granted was procured by mutual mistake.

If, on the other hand, appellant took either of the other two positions, then it misled the Commission by failing to set forth its position and to indicate whether in seeking the authorization for which it applied, it did or did not intend to assume the liabilities of its constituents. In that case, again assuming this Court should now hold the position of the Commission to have been erroneous, appellant procured its authorization through mistake, on the part of the Commission, and lack of disclosure, on the part of appellant.*

Under such circumstances, appellant should not be permitted at this time to take advantage of the erroneous view of the Commission (if held erroneous by this Court), to slough off the obligations of its constituents. Since ap-

* The policy of the Interstate Commerce Act to require the carrier to apprise the Commission fully respecting the security obligations is illustrated by §20a (19). This provision permits a carrier to issue without authority from the Commission, short term notes not to exceed 5% of its outstanding securities, and not to mature more than two years from the date of issue. But even in such cases the carrier is required within ten days to notify the Commission with the same particularity as is required in the case of security issues requiring authorization.

pellee could not intervene, it is plainly the duty of the appellant to apply to the Commission to reopen its application and to determine the same, in accordance with its proper setting. To remit appellee to a supposed remedy by suit against the Lake Erie and Western and then by further suit to trace its assets in the hands of the appellee would be futile. It is over eighteen years since the consolidation was effected. It cannot be doubted that in that time the assets of the Erie have been irretrievably commingled in the assets of the consolidated corporation; that any such remedy would be illusory; and that the remedy on the guarantee is lost, unless it can be enforced against appellant. "The suggestion that creditors may pursue their remedy against the original contracting party is little less than a mockery" (*Mt. Pleasant* v. *Beckwith*, 100 U. S. 514, 534).

The very fact of the default on the guaranty here in suit suggests the futility of pursuing the remedy which appellant asserts to be available.

POINT III

This appeal does not call for a determination as to the application of § 20a to consolidations effected under the amendment of 1933.

The question here presented is limited in scope. It relates to the applicability of § 20a of the Interstate Commerce Act to the debts and liabilities which, by virtue of State statutes, attach to a consolidated interstate carrier, whose consolidation was effected under such State statutes at a time when they had not been superseded by Federal enactment. As regards consolidations which have been or which in future may be effected under paragraph (4) of § 5 of the Interstate Commerce Act, as amended by the Act of June 16, 1933, the question is not here. If and when it arises, it will present a different aspect, depending for its solution on considerations not presented here. For example, to what extent has the amendment superseded State

legislation; has it nullified the application to interstate carriers of such State statutes as § 143 of the New York Railroad Law, or authorized the disregard thereof; can the Federal Government require a State to sanction a consolidation under the laws of that State, free from the conditions annexed by such State laws to such consolidation? If this may be and has been done, then it may be that, as to subsequent consolidations of interstate carriers, since the debts of the constituent corporations would no longer attach, ipso facto, to the consolidated corporation, the new corporation could become liable therefor only if it expressly assumed the obligations and obtained authority. But theretofore, because the complete plan of consolidation had not been adopted and consolidation of interstate carriers were still to be effected solely under applicable State statutes, the Interstate Commerce Commission could not disregard or set aside the provisions of the State statutes governing the incidents of such consolidations. Therefore, § 143 is applicable here and authorization under § 20a was not required.

It may well be that under the amendment of 1933 the entire subject-matter of operation and control, issuance of securities and assumption of liability may be considered and determined under § 5, paragraph (4), without any reference whatsoever to either § 1 (18) or § 20a,—for the amended § 5 (4) gives the Commission full and plenary power to authorize consolidations or acquisitions of control, upon the terms and conditions and with the modifications found by it to be just and reasonable.

CONCLUSION

The judgment should be affirmed.

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